Petition

81-1579

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

Respondent

v.

JOHN F. MILLER

Petitioner

PETITION FOR A WRIT OF CERTIORARI
From the United States Court of
Appeals for the Seventh Circuit

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IN THE UNITED STATES SUPREME COURT

A Petition for a Writ of Certiorari from a decision entered by the United States Court of Appeals for the Seventh Circuit in the case of United States of America -vs- John F. Miller, Case Number 81-1197, Appeal from the United States District Court for the Northern District of Illinois, Case No. 79-CR-436.

Jursidiction is sought pursuant to 18 USC §1254(1). Petitioner seeking a Writ of Certiorari from a decision entered November 23, 1981, by the United States Court of Appeals for the Seventh District. A copy of which is attached as Miller Appendix pages 1 thru 6.

The questions presented are:

1. Did the trial court error in admitting into evidence records of telephones listed in the co-defendant's names without showing that the defendants were the parties making calls to each other and that the conversations were somehow related to the alleged illegal activity?

2. Did the trial Court error in allowing the grand jury testimony of a co-defendant to be published to the jury?

TABLE OF CONTENTS

Statement of the Case..... 1

Argument for a Writ..... 4

Conclusion..... 9

TABLE OF AUTHORITIES

Laughlin v. United States, 385 F.2d 287 (1967).... 4

United States v. Laughlin, 226 F. Supp. 112 (1964). 4

United States v. Baker, 611 F. 2d 961 (4th Cir., 1979)..... 5

Bruton v. United States, 191 U.S. 123 (1968), 88 S. Ct. 1620, 20 L. ed. 2d. 426..... 6

STATEMENT OF THE CASE

Petitioner, John F. Miller, was found guilty following a jury trial before the Honorable George Leighton in the United States District Court for the Northern District of Illinois. The Petitioner was found guilty of conspiring to transport stolen goods in interstate commerce (18 USC 371) and making false declarations before a grand jury (18 USC 1623).

Petitioner was tried along with an employee of his, William Adam, and a certain William Gossett. A major portion of the government's case involved the phone records of the defendants. At issue were 32 phone calls made from the various phones listed in the Defendant's names. As to 30 of the phone calls, the government did not attempt to prove that the defendants made the calls listed or that the topic of conversation involved the alleged conspiracy. Also introduced into evidence was the phone record of one Clement J. Warney of Cleveland, Ohio, an alleged but unindicted co-conspirator.

The purpose of the phone calls being introduced into evidence was to show the parties (Gossett in Chicago, Miller and Adam in Toledo, Ohio and Warney in

in Cleveland, Ohio) were "in constant communication with each other". However, in no way could or did the government attempt to prove that the defendants were themselves calling each other to discuss the alleged illegal activities.

The phone records show that 5 calls were made from phones in Chicago (where the goods were stolen) of which the co-defendant, Gossett, had access (a pay phone in a bar and his girl friend's phone) to Petitioner's place of business in Toledo, Ohio over a three month period. The records also indicate that the Petitioner was in constant communication with his employee, Mr. Adam, both before and after the alleged three month conspiracy.

The records also indicate that 5 phone calls were made to Mr. Adam's home from these same two Chicago numbers during the same period. Also indicated from the phone records were 3 calls from Mr. Adam's home phone to the home of Mr. Warney in Cleveland, where some of the stolen goods were found. At no time did anyone call either Chicago (where the stolen goods originated) or Cleveland (where they were found) from Mr. Miller's business phone.

All three co-defendants appeared before a federal grand jury and denied any involvement with the stolen goods. At trial, over the objection of both the defense counsel and Judge Leighton, the government introduced the grand jury testimony of the co-defendant William Gossett into evidence.

At the conclusion of the trial, the jury found the Defendants Miller and Gossett guilty of perjury and conspiracy, but were unable to reach a verdict as to the Defendant, William Adam.

ARGUMENT FOR A WRIT

The decision rendered by the Seventh Circuit Court of Appeals in this cause is directly in conflict with the opinion of the Court of Appeals for the District of Columbia as set forth in the case of Laughlin v. United States, 385 f.2d 287 (1967). In that case, the Court stated that unsupported phone records of the defendant do not constitute the convincing corroboration that is needed to support a perjury conviction.

> "With regard to the telephone company bills it should be noted that because the person in whose name the telephone is listed pays for the calls billed to his listing, it is no proof whatsoever that certain of those calls were made by him personally, as any of several people may have permission to use his telephone and this is especially true in the case of a business phone". (1.)
>
> District Judge Curran in United States v. Laughlin 226 F. Supp. 112 (1964).

> These records prove only one thing, if they prove anything at all, and that is telephone calls were made between certain numbers. To argue from a phone company

(1) Evidence presented at trial which showed that Petitioner's phone was in fact a business phone with 4 extensions located throughout offices and a plant.

> record showing a call between certain phone numbers that the persons in whose names these phones are listed made the call is destructive of a very important rule of evidence; namely that the person making the entry***should be making the entry based on personal knowledge.***
>
> 385 F.2d 287 at 293

In the case at bar, the Seventh Circuit completely ignored Petitioner's Laughlin/perjury argument and decided the case based upon the non-perjury case of United States v. Baker, 611 F.2d 961 (4th Circuit, 1979). Even in the Baker case the Court held that unsupported telephone records "are at most marginally relevant" and to only have been used to show the interstate nature of the crime. In no way, does such "marginally relevant" evidence constitute convincing corroboration as was needed to convict the Petitioner Miller, on the charge of perjury.

> "I had earlier said something and apparently I am not being heard. I have said that this testimony before the Grand Jury of these three defendants is not necessary to the Government's case in chief in this case, but if the Government wants to do it, to persist on doing it, I don't know for what reason, I think at the time there are some serious constitutional potentials in this question and I don't want to be faced with this question, not in this case".
>
> Judge Leighton at Transcript p. 1023, 5

Miller Appendix
p. 7 & 8.

"Let me make another statement here so that if some other Judge reads this record, I want the other Judge to know that I have tried several times in the course of this trial I have tried to keep the Government lawyers from injecting error into this record. So that if error is injected, despite admonitions, I want everyone to know that I did all that I could do about it".

Judge Leighton
at Transcript page.
1074, Miller Appendix
p. 9.

"It is true he doesn't say "Yes, I did it." "Who was with you?" and so and so. It is true he doesn't say that, but when you put all these answers together, I think that is what it comes to."

Judge Leighton at
Transcript p. 1023,
Miller Appendix
p. 7.

In the case of Bruton v. United States, 191 US 123 (1968), 88 S. Ct. 1620, 20 L. ed. 2d 426, the Supreme Court held that out of Court confessions or admissions by a co-conspirator are inadmissable against the other co-conspirators as it violates the non-confessing party's Sixth Amendment right of confrontation. At issue are certain "admissions" and Confessions" made by the co-defendant Gossett before the grand jury, which the government, despite the warnings

OF Judge Leighton, persisted in publishing before the jury.

Apparently the only defense put forward by the Defendant Gossett is the somewhat pitiful claim that he was drunk on that day and couldn't remember what he did. See Miller Appendix pages 11.

What the Judge was quick to catch was that even though Gossett did not out and out confess to the crime, he did so in so many words. This line of reasoning is also borne out by his attorney's brief three page closing. See Miller Appendix, pages 13 - 16.

Despite the warnings and perception of Judge Leighton, the Seven Circuit casually dismisses the Petitioner's Bruton claim by stating that the situation is not as serious as the one presented in Bruton. See Appendix page 6. How serious a confession must it be before a defendant's Sixth Amendment right is violated? A ridiculous and phony excuse such as was presented here is tantamount to a confession in the eyes of a jury.

> Q. Mr. Gossett were you ever aware of Sherwood stereo receivers being disposed of through the Sandlewood Lounge.
>
> A. I am not aware of any that were sold.

Appendix p. 10

Q. Is it your testimony to this grand jury that you made no attempt to find a buyer for the stolen Sherwood stereo receivers?

A. I don't remember. I remember going out and getting drunk that day?

Appendix p. 11

Q. Did you ever discuss stolen Sherwood stereo receivers with anyone other than Ronnie Maggs?

A. I could have. I don't remember.

Appendix p. 12

That day?? What day?? if he wasn't involved how did he know what day the question referred to? What the jury was getting was a confession, not an out and out confession as Judge Leighton pointed out, but a confession still the same. As such, "The Government should not have the windfall of having the jury be influenced by evidence against the Defendant, which as a matter of law, they should not consider, but which they can not put out of their minds." Bruton p. 129.

It is a bit much to ask a jury to listen to several days of testimony about events in which the defendants are intertwined. Have one "confess" and ask the jury to ignore that confession. In essence,

the co-defendant's grand jury testimony was the same as calling the co-defendant to the stand during the trial, asking him questions and not allowing Petitioner to cross examine him. The co-defendant has in essence become an "unconfrontable" witness which tends greatly to verify and give credence to the Government's case in violation of the Petitioner's Sixth Amendment right of confrontation.

As such, this case gives the Court the opportunity to expand or define the limits of the Bruton doctrine as to what kinds of confessions and admissions are to be excluded under Bruton. The trial judge obviously thought Gossett's admissions were covered under Bruton. The Seventh Circuit thought the situation not as serious as in Bruton. The question is how serious and explicit does a confession have to be before it violates a defendant's Sixth Amendment right of confrontation?

Respectfully submitted,

Thomas A. Yoder
Attorney at Law

This is to certify that a true copy of the Petition for a Writ of Certiorari was mailed to Juan C. Marrero, Attorney, Department of Justice, Washington, D.C. 20530; S. Gay Hugo, Special Attorney, Department of Justice, Chicago, Illinois 60604, this 19th day of February, 1982, by regular U.S. Mail. - Certified.

Thomas A. Yoder
Attorney at Law

Appendix

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued November 9, 1981)

November 23, 1981

BEFORE

Hon. William J. Bauer, Circuit Judge
Hon. Harlington J. Wood, Jr., Circuit Judge
Hon. Terence T. Evans, District Judge*/

UNITED STATES OF AMERICA, Plaintiff-Appellee	)Appeal from the)United States District)Court for the Northern
No. 81-1197 vs.	)District of Illinois)Eastern Division. No.
JOHN F. MILLER Defendant-Appellant	)79 CR 436, George N.)Leighton, Judge.

ORDER

Appellant, John F. Miller, was convicted of conspiring to transport stolen goods in interstate commerce and making false declarations before a grand jury, violations of 18 U.S.C. §371 and U.S.C. §1623, respectively. He claims four errors were committed in the proceeding below. We affirm.

Miller first contends that the trial court erroneously admitted into evidence the records of numerous long

*/The Honorable Terence T. Evans, Judge of the United States District Court for the Eastern District of Wisconsin is sitting by designation.

distance telephone calls without a proper foundation. He argues that the government was required to prove the identity of the callers, not just the mere fact that the telephone numbers were subscribed to appellant and other defendants. We are not persuaded. Telephone records, like other business records, are an exception to the general hearsay prohibition. To be admissable under rule 803(6), Fed. R. Evi., however, certain requirements must be met. "It must be established that the records were kept according to a regular procedure and for a routine business purpose tending to insure accuracy, and that the records not consist merely of cumulations of hearsay or uninformed opinion." United States v. Evans, 572 F.2d 455, 490 (5th Cir.), cert. denied sub nom. Gent v. United States, 439 U.S. 870 (1978). The testimony of telephone company officials satisfied these requirements. The telephone subscriptions were relevant and probative; that the toll records did not establish the callers' identities undercuts the weight of the evidence, not its admissability. See United States v. Baker, 611 F.2d 961, 964 (4th Cir. 1979).

Next, Miller attacks the prosecution's closing arguments, suggesting that improper inferences could be drawn from the government's repeated references to the telephone subscriptions of appellant and other defendants. We disagree. Judge Leighton instructed the jury concerning the limited value of the telephone subscriptions. He also warned the government that any misuse of the subscription evidence would not be tolerated. The government adhered to Judge Leighton's admonitions, and we must assume that the jury did so as well.

The third challenge posed by Miller concerns the trial court's admission into evidence of the testimony given by Barbara Warny and Agent William Greene of the Federal Bureau of Investigation. Agent Greene stated that Warny's husband, Clement, possessed a large number of stolen stereos at the time of his arrest, stereos bearing the same serial numbers as those stolen from the Burlington Northern Railroad yard in Chicago, where this whole affair started. Mrs. Warny testified that her husband received a telephone call from a man named "Bill," who wished to speak to Mr. Warny urgently.

"Bill" may have been William Adam, a co-defendant in this case with whom appellant had much contact. Mrs. Warny also testified that she had heard her husband mention appellant's name and that her husband and appellant had a mutual friend named Bill Del Easter. Tr. at 857. Since no telephone conversation or other connection between appellant and Mr. Warny was shown, appellant apparently was linked to Mr. Warny only by appellant's familiarity with Adam and by Mrs. Warny's testimony.

Miller argues that Judge Leighton conditioned the admission of Mrs. Warny's testimony upon a later showing by the government tying "Bill" to William Adam, a showing which was never made. Based upon a review of the transcript, however, it is clear that the trial court did not condition the admissibility of Mrs. Warny's testimony upon any later showing. In fact when the government offered to bring in the FBI report concerning the telephone call from "Bill," the district court said "I don't think it (the report) makes a bit of difference." Tr. at 859. Mrs. Warny's testimony clearly was not conditioned upon any later

offer of proof and, in any event, was relevant and probative. It was properly admitted.

Similarly, Miller suggests that the trial court conditioned Agent Greene's testimony upon a demonstrated connection between Mr. Warny and appellant. First, Mrs. Warny provided such a connection when she noted that Mr. Warny had mentioned appellant's name and that Mr. Warny had a mutual friend with appellant. Second, even if some imposed condition were not met, Agent Greene's testimony about the arrest of Mr. Warny was not prejudicial to appellant. Nowhere did Greene suggest any connection between Mr. Warny and Miller, nor could any connection be inferred from Greene's testimony. No reversible error was committed.

Finally, Miller contends that the grand jury testimony of co-defendant William Gossett was inadmissable because it violated the principle established in Bruton v. United States, 391 U.S. 123 (1968). We disagree. The confrontation clause problem in Bruton is not present here. At no time did Gossett implicate Miller. Rather, when asked where he ever attempted to discuss with or sell to Miller any stolen stereo receivers, Gossett simply replied that he was drunk

at the time and could not remember. This hardly compares with the serious situation in Bruton, where one defendant directly implicated another during a grand jury proceeding and then refused to testify at trial, thereby preventing cross-examination. Thus, we find no error.

For these reasons, appellant's convictions below are affirmed.

AFFIRMED.

interstate commerce?"

It is true he doesn't say "Yes, I did it."

"Who was with you?" and so and so.

It is true he doesn't say that but when you put all these answers together, I think that is what it comes to.

Now I am going to listen to more about this because after all, I cannot do research just as you can, trying a case and doing research, I cannot do it either, I only have so many hours in the day. But I will listen to see if there is any case that goes so far as to say - - and I think one of the cases cited by the government tends to have that meaning, the case from the Seventh Circuit. They are talking about statements.

MR. LOWRIE: That is G-r-z-y-r-c-z.

THE COURT: I had earlier said something and apparently I am not being heard. I have said that this testimony before the grand jury of these three defendants is not necessarily for the government's case in chief in this case but if the government wants to do it, to persist on doing things and you persist on doing it, I don't know for what reason, I think at the time that there are some serious constitutional

potentials in this question and I don't want to be faced with this question, not in this case. But I will wait and see.

Now I think in view if the fact the defendants.....

(Transcript P. 1023)

Wehner - - direct

...selves and each other and so forth, and then he was asked whether or not he discussed Sherwood stereo receivers with James Falco and John Miller. Whether he ever attempted to - - Why is it necessary to ask this?

These preliminary questions to which objections are being made on these constitutional grounds --

MS. HUGO: Your Honor, I don't believe that the answer I heard about them in any way inculpates any other defendant. There are no defendants' names mentioned in there, and under the government's interpretation of Bruton, it has to be something to definitely inculpate another defendant. Nowhere does the fact that he heard about them state who he heard about them through or anything. It could have been his sister that he heard about them. It could have been anybody.

THE COURT: All right, but that doesn't answer my question, Ms. Hugo.

MS. HUGO: Because the question is because it goes to whether in fact he was aware of the stolen Sherwood stereo receivers, and it goes to his knowledge of that fact.

THE COURT: Let me make another statement here so if some other judge reads this record, I want the other judge to know that I have said several times in the course of this trial I have tried to keep the government lawyers from injecting error into this record. So that if error is injected, despite admonitions, I want everyone to know I did all that I could about it.

My reaction to it is that these preliminary questions aren't necessary.

Furthermore, it's improper to ask a question that shows a defendant went and consulted with his lawyer. Generally, it is improper.

MS. HUGO: I didn't read that question, your Honor. I didn't ask them that.

THE COURT: Well, now wait a minute, Didn't you ask him?

MS. HUGO: I asked him this, but I never asked him

to read any of these. I directed him down far after that. I never asked him about any of this.

THE COURT: All right, Maybe I am mistaken.

MS. HUGO: We can have the court reporter read back exactly what the last question was.

THE COURT: Is that how you understand it?

MR. POPE: Yes, Judge.

THE COURT: In other words, you asked --

MS. HUGO: I asked him this question, and I am directing Mr. Wehner to read this answer. I have no...

(Transcript p. 1073 & 1074)

Wehner -- direct

(The following further proceedings were had and taken in the presence and hearing of the jury):

THE COURT: You may proceed.

MS. HUGO: Is the court reporter ready, your Honor?

THE COURT: Go ahead.

BY MS. HUGO:

Q. Mr. Wehner, I believe the last question was: "Mr. Gossett, were you ever aware of Sherwood stereo receivers being disposed of through the Sandlewood Lounge?" and the fifth line on page 3 --

A. Yes. The answer is, "I am not aware of any that

were sold."

"Were you aware of the sale or disposition of any stolen Sherwood stereo receivers?"

A. I heard about them."

Q. On page 4: "Did you see a truckload?

A. No, I didn't.

Q. Do you know where they were being stored?

A. No, I don't."

Q. Page 6:

"Did you ever attempt to sell Sherwood stereo receivers to John Miller?

A. Not that I can remember.

Q. Did you ever attempt to sell Sherwood stereo receivers to William Adam?

A. Not that I can remember.

Q. Did you ever discuss Sherwood stereo receivers with either John Miller or William Adam.

A. Not that I can remember.

Q. Is it your testimony to this grand jury that you made no attempt to find a buyer for the stolen Sherwood stereo receivers?

A. I don't remember. I remember going out and getting drunk that day.

Q. What did you do the next day? Did you make an attempt to locate a buyer?

A. No. You could say that I went on a binge.

Q. Did you ever make an attempt to locate a buyer for stolen Sherwood stereo receivers?

A. No.

Q. page 7:

Did you ever make an attempt to dispose of any stolen Sherwood stereo receivers?

A. I don't remember.

Q. Did you ever discuss stolen Sherwood stereo receivers with anyone other than Ronnie Maggs?

A. I could have. I don't remember.

Q. Did you ever discuss Sherwood stereo receivers with The Hawk?

A. With who?

Q. James Falco.

A. Not that I remember.

MS. HUGO: Your Honor, may the government have the original of Government's Exhibit 3-A?

THE COURT: Surely.

BY MS. HUGO:

Q. I am going to show you, Mr. Wehner the original and a copy of 3-B. Are they the same except for some notations in the column?

(Transcript p. 1082, 1083 & 1084)

Caloger - closing

(THEREUPON MR. CALOGER ADDRESSED THE COURT AND JURY IN CLOSING ARGUMENT ON BEHALF OF DEFENDANT GOSSETT AS FOLLOWS:)

MR. CALOGER: Your Honor.

THE COURT: Mr. Caloger.

MR. CALOGER: My colleagues and ladies and gentlemen of the jury:

I represent William Gossett. He is here and he has been indicted on three counts.

I will come very much to the point because I cannot elaborate too much upon Mr. Montana's impassioned plea for justice. I won't bring out the burden of proof because you heard that repeatedly and you will probably hear it again.

Referring to the phone calls, the multiplicity of phone calls, as Mr. Montana said, there is no evidence as to who called whom and what the topic of conversation was. Bear in mind that the testimony

has brought out here that Mr. Gossett, my client, knew Mr. Miller and Mr. Adam for a period of years and they had dealt in fireworks and were old acquaintances.

A young man by the name of John Miller who is a grandson of Defendant John Miller, testified that in the summer of 1974 he does not recall having seen Mr. Gossett at his grandfather's farm. He further testified that he was on or about the farm for a goodly part of this time.

With respect to Mr. Falco known as The Hawk, he stated at one time that he did not know Mr. Gossett's last name but he also stated that he was Gossett's cousin by marriage. I think his testimony should be taken very carefully.

Dina Juozapavich contradicted herself repeatedly with reference to Mr. Gossett's being or not being employed at the lounge at the Sandlewood Lounge. I think her testimony has been impugned and it should also be taken very carefully.

Bearing in mind the question of perjury, Mr. Gossett's answers were not "no," but basically, "I don't remember."

I'm going to read to you excerpts from the Count III which is Government's Exhibit 3-A. It is a Grand Jury testimony of Mr. Gossett on July 8, 1975 and on Page 4 that beings with Page 2, by the way -- those questions there and that was propounded by Mr. Wehner who was a Government witness.

"Q. Did you attempt to locate a buyer?"

A. No. I would up getting drunk that day."

The next page at about this time he has also indicated he cannot remember, "Not that I remember" when he is discussing Sherwood stereo receivers with Miller or Adam. He was asked:

"Q. Is it your testimony to the Grand Jury that you made no attempt to find a buyer for the stolen Sherwood stereo receivers?

A. I don't remember. I remember going out and getting drunk that day.

Q. What did you do the next day? Did you make an attempt to locate a buyer?

A. No. You could say I went on a binge."

I think this indicates that Mr. Gossett has had a drinking problem and his testimony before the Grand Jury, which was to some extent noncommittal, should be

taken into consideration, the fact that he has had this drinking problem.

I have nothing further. Thank you.

THE COURT: I think we ought to take a short recess before we hear from Ms. Miquelon or Mr. McGuire. Let us take a short recess.

(RECESS)

THE COURT: Mr. McGuire, you may proceed.

(THEREUPON MR. McGUIRE ADDRESSED THE COURT AND JURY IN CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT MILLER AS FOLLOWS:)

(Transcript P. 1338, 1339 & 1340)